

ORAL ARGUMENT NOT SET

No. 10-1092

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

COALITION FOR RESPONSIBLE
REGULATION, INC. et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

Petition for Review of Decision
of the U.S. Environmental Protection Agency

**MOTION TO INTERVENE
OF THE STATES OF CALIFORNIA, DELAWARE, ILLINOIS, IOWA,
MAINE, MARYLAND, MASSACHUSETTS, NEW MEXICO, NEW
YORK, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON,
THE COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION, AND THE CITY OF NEW YORK**

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Pursuant to Federal Rule of Appellate Procedure 15(d) and Circuit Rule 15(b), the States of California, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Pennsylvania Department of Environmental Protection, and the City of New York (collectively, “Proposed Intervenor States”) hereby move to intervene in this case. These Proposed Intervenor States propose to intervene in support of the U.S. Environmental Protection Agency (EPA) in this case. California has contacted the parties to this action about this motion; Petitioners have stated that they reserve their position pending a review of this motion and EPA has stated that it takes no position on this motion.

INTRODUCTION

On May 7, 2010, Petitioners filed this action seeking review of EPA’s decision to adopt light-duty vehicle greenhouse gas emission standards for model years 2012 to 2016. *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010). To date, one other challenge to these rules has been filed. *See Southeastern Legal Foundation v. EPA*, No. 10-1094 (D.C. Cir. filed May 11, 2010).

The Proposed Intervenor States seek to intervene in this action because the joint efforts of EPA and the National Highway Traffic Safety Administration

(NHTSA) in this rulemaking are the most significant federal efforts to date to address global warming. Global warming is harming, and will continue to harm, California, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington, and their citizens, and the rule challenged by this action will lessen those harms. Moreover, the federal action challenged here insures a level playing field for States, including many of the Proposed Intervenor States, that have adopted their own light duty vehicle emission standards by ensuring that vehicles across the Nation meet the same standards (rather than just vehicles in the Proposed Intervenor States).

The challenged rule was adopted pursuant to a National Program advanced by the federal government, California, and the automobile manufacturing industry. *See* 75 Fed. Reg. at 25,326-28 (discussing National Program). In the commitment letters exchanged by the parties in that National Program, if the federal government adopted greenhouse gas emission standards equivalent to California's already-adopted and approved standards, California would allow compliance with the federal standards to be deemed compliance with its standards; in turn, the automobile industry would drop its lawsuits challenging the California standards and would not challenge these federal standards. *See* www.epa.gov/otaq/climate/regulations.htm (links to commitment letters). The

parties are poised to continue that cooperative spirit for standards applying to model years 2017 to 2025. *See* Improving Energy Security, American Competitiveness and Job Creation, and Environmental Protection Through a Transformation of Our Nation’s Fleet of Cars and Trucks, 75 Fed. Reg. 29,399 (May 26, 2010) (Presidential memorandum directing EPA and NHTSA to work with California on future model year standards). Petitioners’ lawsuit threatens to unravel this historic National Program.

BACKGROUND

In 2007, the Supreme Court “ha[d] little trouble concluding” that the greenhouse gases causing global warming are air pollutants under the Clean Air Act. *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007). The Supreme Court also required EPA to determine, based on the available science, whether greenhouse gases “may reasonably be anticipated to endanger public health or welfare.” *Id.* at 533-34.

EPA has made that endangerment finding. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009). EPA found that “the body of scientific evidence compellingly supports” the finding that “greenhouse gases in the atmosphere may reasonably be anticipated to both endanger public health and to endanger public welfare.” *Id.* at 66,497. EPA also found “that emissions of well-

mixed greenhouse gases from the transportation sources covered by [Clean Air Act] section 202(a) contribute to the total greenhouse gas air pollution, and thus to the climate change problem.” *Id.* at 66,499.

As the Supreme Court noted in 2007, these findings imposed a mandatory duty on EPA to adopt vehicle emission rules for these pollutants. *Massachusetts v. EPA*, 549 U.S. at 533 (quoting Clean Air Act section 202(a), 42 U.S.C. § 7521(a)). The vehicle rules challenged in this action followed. *See* 75 Fed. Reg. 25,324. EPA and NHTSA have set greenhouse gas emission standards and fuel economy standards, respectively, for model years 2012 through 2016. *Id.* These standards are

estimated to result in approximately 960 million metric tons of total carbon dioxide equivalent emissions reductions and approximately 1.8 billion barrels of oil savings over the lifetime of vehicles sold in model years (MYs) 2012 through 2016. In total, the combined EPA and NHTSA 2012–2016 standards will reduce GHG emissions from the U.S. light-duty fleet by approximately 21 percent by 2030 over the level that would occur in the absence of the National Program.

Id. at 24,328. These “will require manufacturers of those vehicles to meet an estimated combined average fuel economy level of 34.1 mpg in model year 2016.” *Id.* at 25,330.

ARGUMENT

Federal Rule of Appellate Procedure 15(d) and Federal Rule of Civil Procedure 24 (regarding intervention in the district courts) guide the Court’s

analysis in determining the appropriateness of a party's intervention before this Court. *See Int'l Union, United Auto., Aerospace, & Agric. Implement Workers Local 283 v. Scofield*, 382 U.S. 205, 216-17 n.10 (1965); *Building & Constr. Trades Dep't v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994). This Court has recognized that Rule 24 was meant to liberalize the requirements for intervention, and that practical considerations guide the Court's analysis. *Nuesse v. Camp*, 385 F.2d 694, 700-01 (D.C. Cir. 1967); *see also Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 105 F.R.D. 106, 109-10 (D.D.C. 1985) (gathering and discussing D.C. Circuit's cases on intervention).

Looking to Federal Rule of Civil Procedure 24(a), as adopted by the courts in applying Federal Rule of Appellate Procedure 15(d), this Circuit has described the requirements for intervention as follows:

[Q]ualification for intervention as of right depends on the following four factors: [¶] “(1) the timeliness of the motion; (2) whether the applicant ‘claims an interest relating to the property or transaction which is the subject of the action’; (3) whether ‘the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest’; and (4) whether ‘the applicant's interest is adequately represented by existing parties.’”

Fund for Animals, Inc. v. Norton, 322 F.3d 728, 731 (D.C. Cir. 2003) (quoting *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998) (quoting Fed. R. Civ. P. 24(a)(2))). These factors are satisfied here, as explained below.

Even if these factors were not met, permissive intervention is also available in certain circumstances. *See* Fed. R. Civ. P. 24(b). It is “well-settled” that the possibility of undue delay or prejudice is the “principal consideration” under permissive intervention. *Citizens for an Orderly Energy Policy, Inc. v. Suffolk County*, 101 F.R.D. 497, 502 (E.D.N.Y. 1984).

The Proposed Intervenor States’ motion for intervention is timely in that it has been filed and served well within thirty days of the petition being filed, as mandated by the Rules. *See* Fed. R. App. P. 15(d). There will be no delay to the case, or prejudice to any parties.

To show a sufficient interest under Rule 24(a), this Circuit has held that an intervenor must show it has constitutional standing, under Article III, and no more. *Mova Pharm.*, 140 F.3d at 1074, 1076; *S. Christian Leadership Conf. v. Kelley*, 747 F.2d 777, 779 (D.C. Cir. 1984). Constitutional standing requires a showing of concrete injury, causation, and redressability. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

In *Massachusetts v. EPA*, the Supreme Court decided that States seeking to avoid the harms of global warming have standing with regard to federal global warming regulatory decisions, such as those challenged in this case. *See* 549 U.S. at 516-26; *see also Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 332-49 (2nd Cir. 2009) (holding that California and other States sufficiently pled facts showing

standing to sue power companies for federal common law nuisance for global warming). The Supreme Court recognized that “[t]he harms associated with climate change are serious and well recognized.” *Massachusetts v. EPA*, 549 U.S. at 521. These harms include:

[A] precipitate rise in sea levels by the end of the century, severe and irreversible changes to natural ecosystems, a significant reduction in water storage in winter snowpack in mountainous regions with direct and important economic consequences, and an increase in the spread of disease.

Id. In particular, the Court discussed the loss and damage to coastal property and infrastructure owned by Massachusetts (the lead petitioner in that case). *Id.* at 522-23. The Supreme Court found causation and redressability because “reducing domestic automobile emissions is hardly a tentative step” even if it is a “small incremental step” and because “[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.” *Id.* at 524-26.

In *Massachusetts v. EPA*, the Supreme Court also recognized that a state government possesses an “interest independent of and behind the titles of its citizens, in all the earth and air within its domain” that gives them each a “special position and interest.” 549 U.S. at 518-19 (quoting *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)). The Supreme Court noted: “It is of considerable relevance that the party seeking review here is a sovereign State and not . . . a

private individual.” 549 U.S. at 518.

Applying this Supreme Court precedent here, it is clear that the Proposed Intervenor States have constitutional standing here, and therefore the required interest to intervene. Here, EPA and NHTSA are taking a significant step in addressing global warming by reducing emissions of greenhouse gases:

“approximately 960 million metric tons of total carbon dioxide emissions reductions” are estimated to come from these rules. 75 Fed. Reg. at 25,328. (Only roughly 636 million metric tons of reductions would occur if NHTSA acted alone. *Id.* at 25,344 (table I.C.1-3).) This “will reduce [greenhouse gas] emissions from the U.S. light-duty fleet by approximately 21 percent by 2030” and that fleet contributes roughly one-fifth of all the U.S. greenhouse gas emissions. *Id.* at 25,326, 25,328; *see also id.* at 25,488 (table III.F.1-1, summarizing reductions). “EPA estimates this would be the equivalent of removing approximately 50 million cars and light trucks from the road in this timeframe.” *Id.* at 25,488. As discussed above, the Supreme Court itself has held that such a step confers standing on Massachusetts and other States.

Moreover, EPA has long recognized that all “[s]tate governments will be affected by the environmental impacts of climate change.” State Activities To Quantify and Reduce Greenhouse Gas Emissions: Assistance Competition, 66 Fed. Reg. 18,245, 18,246 (April 6, 2001) (discussing threats to state infrastructure,

damage to state natural resources, and increased number of ozone exceedences); *see also* 75 Fed. Reg. at 25,493-94 (discussing impacts across the United States).

For example, as to California, EPA has recently found:

California has identified a wide variety of impacts and potential impacts within California, which include exacerbation of tropospheric ozone, heat waves, sea level rise and salt water intrusion, an intensification of wildfires, disruption of water resources by, among other things, decreased snowpack levels, harm to high value agricultural production, harm to livestock production, and additional stresses to sensitive and endangered species and ecosystems.

California State Motor Vehicle Pollution Control Standards; Notice of Decision

Granting a Waiver of Clean Air Act Preemption for California's 2009 and

Subsequent Model Year Greenhouse Gas Emission Standards for New Motor

Vehicles, 74 Fed. Reg. 32,744, 32,764-65 (July 8, 2009); *see also Connecticut v.*

Am. Elec. Power Co., at 341-42 (discussing reduced size of California snowpack

due to global warming). EPA warns against “[e]xpected climate change impacts”

in Illinois and other Midwestern states that include: (1) more extreme heat, with

resulting increases in heat-related illness and death, especially in urban areas; (2)

more extreme precipitation, including downpours and flooding at some times and

droughts at others, leading to effects on water quality and availability and

agricultural productivity; and (3) lower levels in rivers and the Great Lakes, due to

warmer temperatures and increased evaporation, which will impact recreation and

shipping. *See* www.epa.gov/r5climatechange. Studies have shown that Maryland

is vulnerable to climate change impacts of sea level rise on over 3,000 miles of coastline, increased storm intensity, extreme droughts and heat waves, and increased wind and rainfall events. Maryland Commission on Climate Change, Climate Action Plan (August 2008) (available at www.mde.state.md.us/Air/climatechange/legislation/index.asp). Rising sea levels threaten New York's densely populated low-lying coastal areas as well as coastal inlands and beaches, and rising temperatures are expected to result in an increase in heat-related deaths and respiratory illnesses in the state. *See, e.g.,* EPA, Climate Change and New York (1997). In Pennsylvania, climate change is expected to stress existing aquatic ecosystems, forests, and species, result in lower crop yields, and cause negative impacts to human health with more heat related deaths. *See* Environment and Natural Resources Institute of the Pennsylvania State University, Pennsylvania Climate Assessment, Report to the Department of Environmental Protection (7000-BK-DEP4252 6/2009) (June 29, 2009) (available at http://www.portal.state.pa.us/portal/server.pt/community/climate_change_advisory_committee/10412). In Vermont and other New England States, global warming will, for example, harm hardwood forests in a manner that will negatively affect Fall tourism and threaten the maple sugar industry. *See Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F.Supp.2d 295, 321-25 (D.Vt. 2007) (bench trial findings of fact). And, in Washington State, recent assessments of climate change impacts include

predictions of water shortages for cities, towns and agriculture, together with reduced salmon habitat; significantly more heat and air pollution-related deaths; increased fires in areas normally burned by fire; greater vulnerability of pine forests to attack by beetles; erosion at coastal beaches; and substantial increases in energy demand (especially in the summer). *See Washington Climate Change Impacts Assessment: Evaluating Washington's Future in a Changing Climate, Executive Summary* (J.S. Littell, M. McGuire Elsner, L.C. Whitely Binder, and A.K. Snover eds. 2009) (available at: www.cses.washington.edu/db/pdf/wacciaexecsummary638.pdf).

Moreover, California and many of the other Proposed Intervenor States have adopted greenhouse gas emission standards of their own. *See* 74 Fed. Reg. 32,744. A federal program, as adopted by EPA and NHTSA, will ensure that citizens in all States will contribute to the efforts to address global warming and energy security, and that the costs of those efforts will not be borne only by citizens in some States.

Thus, the States of California, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Pennsylvania Department of Environmental Protection, and the City of New York have standing here, and a sufficient interest for intervention as of right.

With the States' interests identified, it is clear that disposition of this action

may impair or impede their ability to protect their interests. Thus, the third criterion in Rule 24(a) for intervention as a matter of right is met.

The final criterion under Rule 24(a) is whether these States' interests are adequately protected by existing parties. This Circuit has held that a party "seeking intervention ordinarily is required to make only a minimal showing that representation of his interest *may* be inadequate." *Env'tl. Defense Fund, Inc. v. Higginson*, 631 F.2d 738, 740 (D.C. Cir.1979) (emphasis added); *see also Fund for Animals*, 322 F.3d at 735. Courts have previously recognized that the interests of one governmental entity may not be the same as those of another governmental entity. *See Forest Conserv. Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995) (finding that the interests of the State of Arizona and Apache County were not necessarily represented by the U.S. Forest Service). EPA and the States may have different interests. This is made evident by the fact that the States had to sue EPA in *Massachusetts v. EPA* to force action that led to the endangerment findings and these vehicle rules. In addition, EPA may, for example, seek to settle or resolve the petitions in ways that might be adverse to the States' interests.

Lastly, even if intervention of right is not granted, the Court should exercise its discretion to allow permissive intervention. As discussed above, there has been no delay, and there will be no prejudice. These Proposed Intervenor States have an

important interest to protect, and are sovereign States, acting to protect their citizens.

CONCLUSION

For the reasons stated, the States of California, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Pennsylvania Department of Environmental Protection, and the City of New York should be entitled to intervene as of right or by permission. These Proposed Intervenor States respectfully request that this Court grant their motion to intervene in this proceeding.

Pursuant to ECF-3(B) of this Court's Administrative Order Regarding Electronic Case Filing (May 15, 2009), the undersigned counsel for the State of California hereby represents that the other parties listed in the signature blocks

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below have consented to the filing of this motion to intervene.

Dated: June 7, 2010

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Case Name: **Coalition for Responsible
Regulation, Inc. v. EPA**

10-1092
No.

I hereby certify that on June 7, 2010, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**MOTION TO INTERVENE
OF THE STATES OF CALIFORNIA, DELAWARE, ILLINOIS, IOWA,
MAINE, MARYLAND, MASSACHUSETTS, NEW MEXICO, NEW YORK,
OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON, THE
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION, AND THE CITY OF NEW YORK**

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. On June 7, 2010, I have mailed the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Eric Hostetler
U.S. Department of Justice
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Washington, DC 20026-3986

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 7, 2010, at Oakland, California.

Marc N. Melnick

/S/

Declarant

Signature